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Illinois Association of County Engineers)

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No. 02-0780

Request for Declaratory Ruling Concerning)

The Underground Facilities Damage)

Prevention Act (220 ILCS 50))

JOINT RESPONSE TO REQUEST FOR DECLARATORY RULING

Respondent, J.U.L.I.E., INC. ("JULIE") by its attorneys, SPESIA, AYERS & ARDAUGH and the ILLINOIS TELECOMMUNICATIONS ASSOCIATION ("ITA") for their joint Response to the Illinois Association of County Engineers ("IACE") Request for Declaratory Ruling state as follows:

I. BACKGROUND

The IACE has filed a Request for Declaratory Ruling with the Illinois Commerce Commission ("ICC"), seeking a declaration that counties and townships should not be required to participate in the State-Wide One-Call Notice System ("System") encompassed within the Underground Facilities Damage Prevention Act ("Act") for storm sewers, culverts, field tile or buried electrical lines to flashing warning(s), flashing stop lights, or signals (A copy of the IACE's Request for Declaratory Relief is incorporated herein by reference).

Respondents JULIE and the ITA respectfully submit that the IACE's position is contrary to the plain language of the Act and contravenes one of the primary purposes of the Act: to provide notice to excavators of utilities that are within the area where excavation is taking place in order to avoid injury to person and property.

II. ARGUMENT

In its Request for Declaratory Relief, the IACE adopts the position that counties and townships should not have to participate in the System because 1) The Illinois Public Utility Act excludes counties and townships who own or operate utilities from the definition of public utilities; and 2) storm sewers, culverts, field tile and buried electrical lines are not utilities.

For the purpose of addressing the issue at hand, a two step analysis is employed below. First, consideration is given to whether counties and townships fall within one of the owner/operator classifications set-forth in Section 2.2 of the Act. Second, consideration is given to whether storm sewers, culverts, field tile and electrical lines connected to warning(s) and traffic signals are deemed "utilities" under the Act. As established below, both of these inquiries are answered in the affirmative. Therefore, counties and townships are required to participate in the System.

1. Counties and townships are required to participate in the State-Wide One-Call Notice System encompassed within the Illinois Underground Facilities Damage Prevention Act.

Section 2.2 of the Act requires all owners or operators of underground utility facilities to participate in the System. Section 2.2 of the Act reads as follows:

§. 2.2 Underground Utility Facilities. "Underground Utility Facilities" or "facilities" means and includes wires, ducts, fiber optic cable, conduits, pipes, sewers, and cables and their connected appurtenances installed beneath the surface of the ground by a public utility (as is defined in the Illinois Public Utility Act, as amended), or by a municipally owned or mutually owned utility providing a similar utility service, except an electric cooperative as defined in the Illinois Public Utilities Act, as amended, or by a pipeline entity transporting gases, crude oil, petroleum products, or other hydrocarbon materials within the State or by a telecommunications carrier as defined in the Universal Telephone Service Protection Law of 1985, or by a company described in Section 1 of "An Act

relating to the powers, duties and property of telephone companies", approved May 16, 1903, as amended, or by a community antenna television system, herein referred to as "CATS", as defined in the Illinois Municipal Code, as amended. (Emphasis Added).

Section 2.2 identifies three categories of owner/operators of facilities; 1) public utilities, as defined by the Public Utility Act; 2) municipally owned utilities, and 3) mutually owned utilities. The first two categories are addressed within this section. The third, "mutually owned utilities" is addressed in Section 3.

A. Public Utility

In its Request for Declaratory Relief the IACE takes the position that counties and townships cannot be construed as a "public utility" under the Act. As referenced above, the Act incorporates the definition of "public utility" as provided under the Illinois Public Utility Act, 220 ILCS 5/3-105. Section 105(1) of the Public Utility Act reads as follows:

"Public Utility" does not include however:

1. Public utilities that are owned and operated by political subdivisions, public institution of higher education or municipal corporation of this State, or public utilities that are owned by such a political subdivision, public institution of higher education, or municipal corporation and operated by any of its lessees or operating agents." 220 ILCS 5/3-105(1).

Relying on this language, the IACE concludes that counties and townships are "political subdivisions" and "municipal corporations" and therefore, excluded from the term "Public Utility" (See page 2 of the IACE's Petition). However, even if the IACE's position is taken as true for the sake of argument¹, counties and townships still fall within the classification of "municipally owned utility" as provided under Section 2.2 of the Act.

¹ The Act does not define the terms "political subdivisions" or "municipal corporations".

B. Municipally Owned Utilities

The ICC has recently addressed the term "municipally owned utility" as used within the Act to determine whether Sanitary Districts fall within this definition (In re Wheaton Sanitary District, ICC No. 02-0345). In doing so it was noted that the term "municipally owned" was not defined under the Act. Therefore, basic tenants of statutory construction had to be employed.

Under Illinois law when interpreting a statute the intent of the legislature must first be considered. Nottage v. Jeka, 172 Ill. 2d 386, 667 N.E.2d 91 (1996). The intent can be ascertained through a consideration of the language contained within the statute. Business and Professional People for the Public Interest v. Illinois Commerce Commision, 146 Ill. 2d. 175, 585 1032 (1991). Further, when interpreting a statute the plain and ordinary meaning of the words are considered, unless another meaning is clearly evident. Texaco-Cities Service Pipeline Co. v. McGraw, 182 Ill. 2d 262, 695 N.E.2d 481 (1998). The statute should also be considered as a whole so each provision can be evaluated in relation to the other provisions contained within the statute. Primeco Personal Communications, L.P. v. Illinois Commerce Commission, 196 Ill. 2d 70, 750 N.E.2d 202 (2001).

Applying these rules of construction, it is axiomatic that counties and townships fall within the term "municipally owned utility". If the IACE's position were to be adopted, the term "municipally owned utility" would be rendered superfluous. This is particularly true when considering that the IACE concedes within its petition that counties and townships are municipal entities. (See pg. 2 of the IACE's Request for Declaratory Ruling).

Moreover, a reading of the Act in its entirety supports the position that counties and townships are required to participate in the System. For example, Section 14 of the Act provides:

"The regulation of underground utility facilities and CATS facilities damage prevention, as provided for in this Act, is an exclusive power and function of the state. A home rule unit may not regulate underground utility facilities and CATS facilities damage prevention as provided for in this Act. All units of local government including home rule units, must comply with the provisions of this Act..." (emphasis added).

Section 14 clearly codifies the legislature's intent that all units of local government (including counties and townships) be required to comply with the provisions of the Act.

Finally, when interpreting the term "municipally owned" in the matter of Wheaton Sanitary District, ICC No. 02-0345, the Commission aptly noted that the Act was "[d]esigned to promote sound practices in excavation work, and in that manner to protect the personal safety of workers and nearby residents and minimize disruptions in utility service." To adopt the IACE's application would create a gap in the Act's coverage and expose excavators and other individuals (residents, motorists, etc...) to potential harm. Such a position contravenes the purpose of the Act. (See Final Order in ICC No. 02-0345 dated July 24, 2002).

In light of the above, it is evident that counties and townships are included in the scope of the Act. Indeed, utilities buried underground by these entities (counties and townships) fall squarely within the term "municipally owned utility". With this in mind, the issue becomes whether sewers, culverts, field tile and electrical lines are deemed "utilities".

2. **Sewers, culverts, field tile and buried electrical lines which provide electricity to flashing warnings, stop lights or traffic signals are utilities that fall within the scope of the Act.**

A. **The Subject Facilities Fall Within the Plain Language of Section 2.2 of The Act.**

The IACE argues in its Request for Declaratory Relief that although “underground utility facilities” references “municipally owned utility” within Section 2.2 of the Act, it does not believe that storm sewers, culverts, field tile or buried electrical lines which provide electricity to flashing warning signs, stoplights or traffic signals etc... should be considered “utilities”. Such a position is contrary to the plain language of the Act.

As referenced above, Section 2.2 defines facilities as:

“[w]ires, ducts, fiber optics, conduit, pipes, sewers, and cables and their connected appurtenances installed beneath the surface of the ground...” (emphasis added).

The plain language of Section 2.2 specifically references “wires” and “sewers”. Therefore, it would be contrary to the Act to exclude buried storm sewers or electrical lines from the definition of “underground utility facility”. Likewise, insofar as “pipes” are utilized for culverts, a culvert must also be deemed a facility for purposes of the Act. This same reasoning holds true with respect to field tile. Field tile(s) are part of a drainage system and work in conjunction with culverts, sewers, etc... Thus, at the very least field tile are properly deemed “connected appurtenances” under the Act.

B. **The (4) reasons set forth by the IACE in Section B of its Request for Declaratory Ruling do not support the position that storm sewers, culverts, field tile and electrical wires are not “utilities”.**

In Section B of its Request for a Declaratory Ruling, the IACE sets forth the following four reasons it feels supports its position that the subject facilities should not be construed as falling within the scope of the Act: 1) the facilities specified do not provide a utility service; 2) no fees are imposed on public customers for services provided through these facilities; 3) after the installation of these facilities there is no operation or regulation of a system to provide and/or maintain service to a customer; and 4) storm sewers, culverts and field tile are enclosed ditches that carry rain water.

Respondents respectfully submit that the reasons provided for by the IACE are best characterized as over simplified statements that do not support excluding the participation of counties and townships from the System.

i) Utility Service:

Contrary to the contentions of the IACE the facilities at issue do provide a utility service. Webster Dictionary defines the term "utility" as "[a] quality or state of being useful; usefulness..." (Webster Dictionary, Second Edition, p. 2808). Storm sewers, field tile and culverts all direct, manage, and regulate water flow. This benefits the public at large and provides a utility service. Likewise electrical wires that connect stoplights, warning signs or other traffic signals provide electricity for public use on county and township thoroughfares. By nature, such facilities provide a service and a product to the public at large. As such, these items are properly deemed "utilities".

ii) Imposition of Fees:

The IACE states in its Request for Declaratory Relief fees are not imposed on customers for services provided by these facilities. However, the IACE ignores the fact that revenues generated by way of taxes are utilized by counties and townships for the

purpose of supporting and maintaining these facilities. Therefore, while a monthly billing statement may not be generated for the services provided, the facilities at issue do come at a cost to the public consumer. Thus, there is an imposition of fees.

iii) Operation and Regulation of Facilities:

The IACE's position that subsequent to the installation of the subject facilities there is no operation or regulation of the system to provide and maintain service is also misplaced. Townships and counties throughout the state have public works departments that are charged with maintaining the facilities at issue. Indeed, if electrical wiring owned by a county or township for traffic control signals was damaged one would presume that the county or township would repair the damaged wiring and not leave a traffic signal or warning inoperational because of the potential public harm. This same reasoning holds true for storm sewers, culverts and field tile. Therefore, there is operation and regulation of the facilities at issue.

iv) Enclosed Ditches:

The IACE also asserts that storm sewers, culverts and field tile are in essence closed ditches that carry rainwater and as such, should not be considered utilities. However, this characterization actually supports the position that these facilities fall within the purview of the Act. As noted above, such facilities provide a service to the public. By nature they are utilities.

In short, a utility is a commodity or service that is of public need. Each of the facilities at issue meets this basic definition. The reasons set forth by the IACE that such facilities should not fall within the definition of the Act are not only contrary to the

plain language of the Statute but upon closer analysis, actually provide support that such facilities are properly deemed "underground utility facilities".

C. **The other considerations raised by the IACE in Section C of its Request for Declaratory Relief do not provide a basis for exempting counties and townships from taking part in the System for the facilities that are at issue.**

The IACE also asserts that it would be difficult for counties and townships to locate the specified facilities and that these entities currently have a permitting system in place which serves as an effective basis in which to provide notice to contractors for the facility to which counties and townships have notice. The IACE then goes on to assert that if it fails to properly locate such facilities excavators could then escape liability for any damage caused to such facilities. Again, these reasons do not support exempting townships and counties from the System.

Upon information and belief, not all counties and townships maintain a permitting system that would provide proper notice to excavators of county and township facilities. The One-Call System was put in place to provide for such a uniform system. To allow pieces of the puzzle (i.e. counties and townships) to be exempt from the System would create gaps and defeat the primary purpose of the Act. Further, even if it is assumed for the sake of argument that a permitting system is employed by counties and townships, the System provided under the Act would only work to ensure that a uniform system is in place that protects excavators and persons living, working, or travelling within townships and/or counties that could be affected by a disruption in these facilities.

Further, any difficulty in locating the specified county and township facilities would only be at the initial stages. The location of such facilities is not only beneficial

for the township or county that own or operate such facilities but would also properly displace the cost of damage caused to these facilities during the course of excavation work being done within a township or county. Put another way, if the position espoused by the IACE is adopted, a county or township would be rewarded for not taking any steps to notify excavators of such facilities resulting in potential harm to the excavators and other users of the facilities at issue. Again, such a position is contrary to the purpose of the Act.

Finally, the IACE points to their interpretation of IDOT's non-participation within the System. First, IDOT's participation, or non-participation, in the System should have no bearing to the issue at hand. That said, the IACE's reference to IDOT is misguided. It is important to note that IDOT is not completely exempt from the System. (See 220 ILCS 40/5.) Further, it should be noted that IDOT implemented its own system prior to the enactment of JULIE for the location and marking of underground utilities and facilities. It was/is only due to the existence of this system that IDOT has chosen to participate in the One-Call System on a limited basis.

3. Limitation of Relief Requested.

The determination of whether a county or township falls within the definition of a "mutually owned utility" requires consideration of specific facts. For example, whether a particular county and township entered into a franchise agreement, contract or other agreement with another entity could be of import. The IACE has not provided a sufficient amount of factual information within its Request for Declaratory Relief to conduct an analysis with respect to whether counties or townships can fall within this classification.

In light of the above, Respondents request that in the event that the ICC approves the position proposed by the IACE, any Order issued specifically provide that the ruling does not preclude further determination on this issue.

III. CONCLUSION

Respondents, JULIE, INC. and the ILLINOIS TELECOMMUNICATIONS ASSOCIATION, request that the Illinois Commerce Commission deny the Illinois of County Engineers' request for declaratory ruling and issue an Order finding that counties and townships are required to participate in the One-Call System for storm sewers, culverts, field tile and buried electrical lines to flashing warning(s), flashing stop lights, and signals.

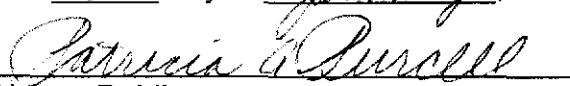

Attorneys for Respondent, JULIE, INC.

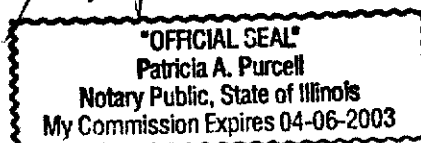
John R. Ardaugh - 06192107
Jeffrey S. Taylor - 6227171
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Jeffrey S. Taylor, being first duly sworn on oath, deposes and says that he has been designated as an agent for JULIE, Inc. in this behalf, that he has read the foregoing response, knows the contents thereof, and that the same is true to the best of his knowledge in substance and in fact.


Jeffrey S. Taylor

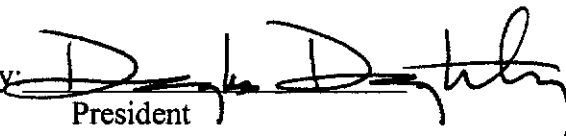
Subscribed and sworn to before me
this 13th day of January, 2003.


Notary Public



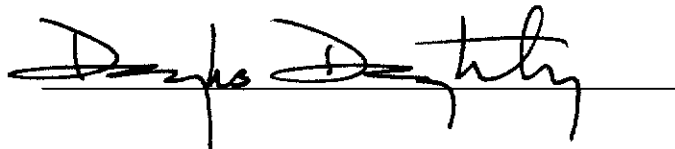
January 13, 2003

Respectfully submitted,

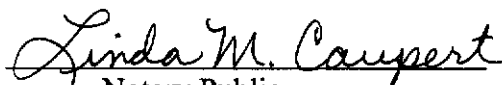
By: 
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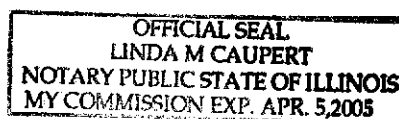
STATE OF ILLINOIS :
 : ss
COUNTY OF SANGAMON :

Douglas A. Dougherty, being first duly sworn on oath, deposes and says that he is President of THE ILLINOIS TELECOMMUNICATIONS ASSOCIATION, INC. and that the statements made in the foregoing document are true.



Subscribed and sworn to before me
this 13th day of January, 2003.


Notary Public



STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Association of County Engineers)

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NO. 02-0780

Request for Declaratory Ruling Concerning
The Underground Facilities Damage
Prevention Act (220 ILCS 50)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE THAT ON THE 13th day of January, 2003, we mailed for filing with the Clerk of the Illinois Commerce Commission, J.U.L.I.E., INC.'s and the Illinois Telecommunications Association's Joint Response to Request for Declaratory Ruling, a copy of which is attached hereto.

BY:

On behalf of J.U.L.I.E., INC. and the ILLINOIS
TELECOMMUNICATIONS ASSOCIATION

STATE OF ILLINOIS)

) SS

COUNTY OF WILL)

Patricia Purcell, being first duly sworn on oath, deposes and says that he served a copy of the above Notice by enclosing same fully prepaid in an envelope, plainly addressed as is shown above, and placing in a UPS Next Day Air box in Joliet, Illinois on the 13th day of January, 2003 before the hour of 5:00 p.m. **Sent regular U.S. Mail to Mr. Bill Boyd.**

Patricia A. Purcell

Subscribed and sworn to before
me this 13th day of January, 2003

Rebecca L. Bright
NOTARY PUBLIC

"OFFICIAL SEAL"
REBECCA L. BRIGHT
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 10-21-2003

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